IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.2736 OF 2004

Vikrama Shama Shetty. ...Petitioner.

Vs.

The State of Maharashtra & Ors. ...Respondents

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Mr. E.H.Kotwal with Mr.Rajiv Deokar and Mr. D.B. Sawant for the Petitioner.

Mr.G.W. Mattos, AGP for the Respondents.

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CORAM : DR.D.Y.CHANDRACHUD, J.

17th January 2005.

P.C.:

1. The only point which is in controversy in these proceedings and which forms the subject matter of the submissions made before the Court is, the distance between the establishment of the Petitioner and the mosque situate in the vicinity. An FL-III licence under the Bombay Prohibition Act, 1949, has been refused by the revisional authority

on the ground that the distance between the establishment of the Petitioner and the entrance to the mosque is less than 75 meters. The distance of 75 meters is mandatorily prescribed by Rule 45(1-C) of the Bombay Foreign Liquor Rules, 1953 which is in the following terms:

> "45.(1-C) No licence under sub-rule (1-B) shall be granted in respect of any hotel or restaurant which is situated within a distance of seventy five metres from any educational or religious institution or from any bus stand, station or depot of the Maharashtra State Road Transport Corporation or from the boundary of any National or State highway:
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> Explanation, - For the purpose of this sub-rule, -
>
> (i) "educational institution" means any pre-primary, primary or secondary school managed or recognised by any local authority or the State Government or the Central Government and any college affiliated to any University established by law, but does not include any private coaching institution;
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> (ii) "religious institution" means an institution for the promotion of any religion and includes a temple, math, mosque, church, synagogue, agiary or other place of public religious worship which is managed or owned by a public trust registered under the Bombay Public Trusts Act, 1950 (Bombay XXIX of 1950) and included such other religious institutions as the State Government may by order specify in this behalf;
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> (iii). The distance referred to in clause (a) of this sub-rule shall be measured from the mid-point of the entrance of the hotel or restaurant along with the nearest path by which the pedestrian ordinarily reaches:-
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> (a) the mid-point of the nearest gate of the institution if there is a compound wall and

if there is no compound wall, the mid-point of the nearest entrance of the institution, or

(b) the mid-point of the nearest gate of the bus stand, station or depot of the Maharashtra State Road Transport Corporation if there is a compound wall and if there is no compound wall, the nearest point of the boundary of such bus stand, station or depot, or

(c) the boundary of the National or State highway."

2. Initially in pursuance of an order dated 17th December 2003 passed by a Learned Single Judge of this Court, joint measurements were taken and the report of the joint measurement dated 19th December 2003 is that the distance is less than 75 meters. Again when the matter was before this Court for admission, an order was passed on 3rd November 2004, by a Learned Single Judge by which the Prothonotary and Senior Master was directed to appoint an Architect from the panel of Architects maintained by the Court to carry out a measurement in terms of Rule 45(1-C). The Architect has submitted his report together with a plan.

3. The report of the Architect shows that the Hotel belonging to the Petitioner abuts on Abhaychand Gandhi Marg and the mosque is located across the road at the junction of Abhaychand

Gandhi Marg and Narsi Natha Street. The mosque has three entrances out of which two are from a common passage having access to Narsi Natha Street. The third entrance is from Abhaychand Gandhi Marg.

4. The Court Commissioner has reported that the distance from the first entrance to the mosque from Narsi Natha Street to the establishment of the Petitioner, in accordance with Rule 45(1-C) is 68.45 meters. Though the door to the mosque was closed when the Commissioner went for inspection, the report records that the door was opened on the request of the Commissioner and it was found that it directly opened into the prayer hall of the mosque.

5. The second entrance to the mosque from Narsi Natha Street is at a distance of 98.47 meters. The third entrance to the mosque from Abhaychand Gandhi Marg is at a distance of 60.06 meters. The report of the Commissioner notes that this door is generally closed and is occasionally used as an exit. The Commissioner has further recorded that during the course of inspection, he was informed that generally people enter the mosque through the second entrance.

6. In the present case, the Court is called upon to consider the legality of an order dated 28th July 2004 passed by the revisional authority which held that an FL-III licence could not lawfully be allowed in respect of the establishment of the Petitioner since there was an infringement of the mandatory distance required under Rule 45(1-C). The measurement has been taken twice - one in pursuance of the order passed by a Learned Single Judge of this Court on 17th December 2003 and again in pursuance of the order dated 3rd November 2004 passed in these proceedings. From the report of the Commissioner appointed in these proceedings, it is clear that two entrances to the mosque are in any event within the mandatory distance of 75 meters. It may be that on a particular occasion one of the entrances is closed but it is evident that the door thereto opens directly into the prayer hall of the mosque. One of those entrances, the Commissioner records, is occasionally used as an exit point. One of the three entrances, the second entrance lies beyond the distance of 75 meters. The photographs which are produced before the Court by the A.G.P. confirm what has been stated by the Court Commissioner, namely, that the establishment of the Petitioner is located across the road from the mosque. These photographs are

taken on record and marked as X-1, X-2 and X-3. The exercise of jurisdiction by the revisional authority in this matter cannot by any means be regarded as perverse or contrary to law. The measurements have not been challenged in the submission of Counsel. The view which has been formed by the authority does not warrant any interference under Article 226 of the Constitution.

7. The Rules have a statutory character and have been framed in the the public interest. Since the Rules hold the field, the issue as regards the maintenance of a minimum distance has to be decided not on the basis of general consideration, but on an application of the Rules. The distance between the establishment of the Petitioner and the mosque falls within the prohibition imposed in Rule 45(1-C). The Court under Article 226, it is well settled, cannot mandate or direct a deviation from the provisions of law validly made including Rules framed in exercise of the power of delegated legislation.

8. The Petition is accordingly rejected.

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